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18 U.S.C. 659

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 491

J. C. GULLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-26) is reported at 319 F. 2d 77.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1963. A petition for rehearing was denied on July 24, 1963 (Pet. App. 27). By an order of August 13, 1963, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to

and including September 23, 1963. The petition was filed on September 21, 1963.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in failing to give an explicit instruction that the testimony of accomplice witnesses should be received with caution albeit no such instruction was requested and no objection was made to the charge as given.

2. Whether the evidence was sufficient to establish that the value of goods possessed by petitioner after they had been stolen from an interstate shipment exceeded $100.

STATUTE INVOLVED

18 U.S.C. 659 provides in part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, * * * with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; * * *
>
> * * * *

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[1] Although the petition was filed within the extended time limit, the certified record which must accompany the petition (Revised Rules 21(1)) was not filed until September 25, 1963, two days late.

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * *

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possessing 49 automobile tires valued at more than $100, knowing them to have been stolen from an interstate shipment, in violation of 18 U.S.C. 659 (R. 3a, 6a).[1] Petitioner was sentenced to imprisonment for two years, to be eligible for parole at such time as the board of parole may determine (R. 102-103a). On appeal the conviction was affirmed (Pet. App. 21-26).

1. The principal government witnesses were Coleman, a juvenile, and Johnson, a defendant who had pleaded guilty (R. 4a-5a, 4b, 44b). The evidence showed that on the evening of November 23, 1961, Johnson, Coleman, and one or two others removed 49

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[1] Petitioner was tried together with four other defendants. Two were co-defendants in the possession charge, and the other two had been named in a separate indictment charging theft of property, including that which petitioner later possessed, from an interstate shipment. The indictments were consolidated for trial. Petitioner's co-defendants in the possession charge were acquitted, and the defendants charged with the theft were convicted (R. 1a-3a). The convictions of these defendants are not involved in the present petition.

tires and 45 cartons of children's clothing from a trailer parked in a terminal in the city of Detroit. The goods were in transit from out-of-state destinations to the Detroit area (R. 10a-13a, 73a, 28b-32b). Using the car of another defendant, the thieves moved the stolen merchandise to a vacant house (R. 16a, 50a, 19b, 23b-27b, 34b-36b). On the morning of November 24, 1961, petitioner came to the house to negotiate for purchase of the tires. The price asked and offered varied between $6 and $9 per tire. Petitioner finally agreed to purchase the lot of 49 tires for $300 (R. 16a-19a, 30a, 48a, 81a-82a, 9b, 54b, 57b, 60b). Four of the tires were then loaded into the trunk of his car, and petitioner drove away (R. 83a). About ten minutes later he returned in a different automobile and waited until a truck arrived (R. 84a) into which the other tires were loaded (R. 78a-79a, 42b). The police came on the scene as the loading was being completed (R. 42b-43b).

The terminal manager for Consolidated Freight Company identified the manifest listing shipments on the trailer from Akron, Ohio, to Detroit, Michigan (R. 73a). On the morning of November 24, 49 tires were missing from the shipment. Of these, 33 were recovered, leaving a total shortage of 16 tires for which the freight company paid $429.12 to Cadillac Motor Company, the consignee (R. 76a-77a).

Coleman, one of the government witnesses, identified a signed written statement he had given to the Federal Bureau of Investigation on April 2, 1962, one week before he went into the army (R. 21a-22a, 38a). He testified that the statement was not entirely ac-

curate (R. 25a-26a, 45a-46a, 51a). He further testified that on April 25, 1962, the opening date of the trial, he informed the Assistant United States Attorney that he was unwilling to testify. He was then told that if he did not testify the Assistant United States Attorney would have him removed from the army and tried as a juvenile (R. 59a, 60a, 63a). He also testified that government counsel told him to tell only the truth, and that he had given the truth in his testimony (R. 61a), but that because of his attorney's absence he did not know whether the threat to remove him from the army could be carried out, and his trial testimony was therefore given "under pressure" (R. 68a).

Johnson testified that he had pleaded guilty in the instant case and was awaiting sentence. He also testified that he was awaiting trial in a second federal case (R. 44b-45b).

2. Petitioner made no objection to the trial court's instructions to the jury (R. 125b), nor is there any indication that he requested an instruction concerning the credibility of an accomplice. The district judge did not instruct the jury specifically with respect to accomplice testimony, but he did tell the jury that in determining the credibility of a witness it might consider "the interest of the witness, if any, in the results or the outcome of the case" and "the motives of the witness in testifying" (R. 122b). With regard to the threat made to Coleman, the court instructed as follows (R. 122b-123b):

The evidence in this case shows, among other things, that the Assistant United States Attorney threatened to have the Government witness Ray Coleman removed from the army to prosecute him under the Federal Juvenile Delinquency Act for his participation in the incident involved in these indictments if he should refuse to testify for the Government on this trial.

I charge you that these tactics on the part of the Government were highly improper, and should not have occurred, and is one of the facts and circumstances you may take into consideration in weighing the testimony of the witness Coleman, and in deciding the credibility to be given to the witness Coleman. * * *

ARGUMENT

1. Although petitioner's counsel made no request for a specific instruction that Coleman and Johnson were accomplices whose testimony should be received with extreme care and caution and did not object to the court's failure so to instruct, petitioner now contends that the omission of the charge constituted reversible error. As the court of appeals observed, however, the district judge did instruct the jury fully with respect to the credibility of witnesses, telling it to take into consideration the motives of the witnesses in testifying, and calling particular attention to the impropriety of threats by government counsel as a factor to be weighed. The judge was under no duty to review specifically every fact bearing on credibility which the defense had brought out on cross-examination of the witnesses. Although it

may be better practice to caution juries as to the credibility of accomplice witnesses, failure to give such an instruction does not constitute reversible error, *Holmgren* v. *United States*, 217 U.S. 509, 523-524; *Caminetti* v. *United States*, 242 U.S. 470, 495, particularly if no request is made for such a charge, *Young* v. *United States*, 297 F. 2d 593, 594 (C.A. 9), certiorari denied, 369 U.S. 891; *Mims* v. *United States*, 254 F. 2d 654 (C.A. 9); *United States* v. *Finazzo*, 288 F. 2d 175, 176 (C.A. 6), certiorari denied, 368 U.S. 837; *Pagliochini* v. *United States*, 264 F. 2d 583 (C.A.D.C.).

Moreover, the substance of such an instruction was brought to the attention of the jury by the government attorney who, in his closing argument, referred to the testimony of the government's witnesses as that of "accomplices" and told the jury that this evidence was "to be weighed carefully" (R. 101b, 111b).

2. Contrary to petitioner's contention, there was substantial evidence that the stolen tires had a value of more than $100. The value of the tires was proved by the testimony of the terminal manager that for the unrecovered 16 tires, the freight company paid $429.12 to the consignee (R. 73a, 76a-77a). Cf. *United States* v. *Marpes*, 198 F. 2d 186, 189 (C.A. 3), certiorari denied, 344 U.S. 876; *United States* v. *Crawford*, 195 F. 2d 472, 474-475 (C.A. 3); *Gordon* v. *United States*, 164 F. 2d 855, 858-859 (C.A. 6), certiorari denied, 333 U.S. 862. Furthermore, the evidence established that in negotiations for sale of the 49 tires the asking price varied between $6 and

$9 per tire, and that petitioner himself valued them at no less than $300. Hence there was more than adequate evidence upon which the jury could find that the stolen tires "were of the value of more than $100," which the court charged to be one of the essential elements of the offense (R. 119b).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1963

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